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Supreme Court, U.S.
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No. 00-1821

In The

Supreme Court of the United States

ALEX STEVENSON, by and through his father and next friend, Elmer William Stevenson; ELMER WILLIAM STEVENSON, on his own behalf,

Petitioners,

v.

MARTIN COUNTY BOARD OF EDUCATION; WILLIE C. PEELE, Superintendent of Martin County Schools, individually and in his official capacity; HARRY D. RESPASS, Principal of Williamston Middle School, individually and in his official capacity; SWANOLA CHANCE, teacher at Williamston Middle School, individually and in her official capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF OPPOSING PETITION FOR CERTIORARI

The Stevensons – Alex and his father – have petitioned for certiorari to review the decision of the Fourth Circuit Court of Appeals. The Martin County Board of Education and the school officials who are the other defendants in this case oppose the petition. At issue is whether the Court should recognize for the first time, as the Stevensons argue, a federal constitutional right of public school students to be protected from harm by other students, or whether the subject should continue to be left to state law. While the Stevensons' lawsuit is of considerable interest to these parties, there is nothing sufficiently remarkable about it, legally or factually, to warrant this Court's review. The Stevensons incorrectly assert that the decision of the Fourth Circuit conflicts with decisions in other circuits. In fact, the Fourth Circuit opinion is consistent with a long line of cases from the other circuits.

STATEMENT OF FACTS

Although respondent school officials would dispute the Stevensons' version of the facts if this case were to be tried, the case is before the Court on a motion to dismiss and, therefore, the Court must take the facts as alleged. The essential allegations are that Alex Stevenson was a sixth grader at Williamston Middle School in Martin County from August through October 1998 (Joint Appendix at 8);[1] he was assaulted by another student while at

[1] Joint Appendix or "J.A." refers to the Joint Appendix on file with the Fourth Circuit Court of Appeals.

school on 18 September 1998 (J.A. at 11-13); he contends that the superintendent and school principal should have known that he was threatened and should have acted to prevent the assault (J.A. at 16-17); and that his father withdrew Alex from the Martin County Schools on 29 October 1998 to attend private school for the remainder of the academic year (J.A. at 8, 16). Despite the assertion that school officials did nothing in response to Alex's problems, the Complaint acknowledges that as early as August 10th another student was suspended for fighting with Alex (Complaint, ¶ 16, J.A. at 10); that later in August Alex himself was suspended for fighting, as was another student (Complaint, ¶¶ 17-18, J.A. at 10); that yet another student involved in the August altercation was suspended (Complaint, ¶ 23, J.A. at 11); and that two students were suspended and sent to separate schools as a result of the September 18th incident (Complaint, ¶ 51, J.A. at 13).

ARGUMENT AGAINST GRANTING WRIT

The Stevensons argue that certiorari should be granted because (1) this Court has not decided whether students have a federal constitutional right to protection from harm by other students, (2) the Fourth Circuit decision is in conflict with decisions of this Court and of the Third, Fifth and Tenth circuits and the North Carolina Supreme Court, and (3) the circuit courts "have struggled" with the circumstances in which a state can be held liable for harm inflicted by non-state actors.

Actualiy, this Court has provided ample guidance on the issues in this case and there is no conflict within the circuits. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), held that the Due Process Clause does not establish a duty of public officials to protect individuals from harm by others unless a "special relationship" has been established between the governmental agency and the person injured. Although *DeShaney* itself did not concern public schools, the circuit courts for the Third, Fifth, Sixth, Seventh, Eighth and Tenth circuits all have decided that school attendance does not create such a special relationship as to impose liability. No circuit court has decided the other way.

The "conflicts" the Stevensons cite with the Third, Fifth and Tenth circuits are not over the issue of a *DeShaney* special relationship, but, as the Stevensons see it, over a more general question of the framework for analysis of the due process right in other contexts. Whether or not the Stevensons are correct about such a conflict, it has not affected the application of *DeShaney* to school circumstances.

Likewise, there is no conflict with decisions of the North Carolina Supreme Court. The state court has not addressed the federal constitutional right to protection, but it has consistently recognized a state common law action for negligence against school personnel for failing to protect students against injury by other students. The Stevensons do not address that case law but instead cite recent state appellate decisions about the public duty doctrine. The public duty doctrine is an exception to the general rules of liability which would be relevant only if

state courts had held that it applied to school officials, but they have not.

I. THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Stevensons argue that school safety is a matter of great public importance and that students' right to protection is an issue which has not been addressed by this Court. The Martin County school board does not dispute, by any means, that school violence is an issue of paramount importance. Even in rural North Carolina, it is a matter of daily concern. Other than asserting the importance of the issue, however, the Stevensons do not explain how creating a federal constitutional right – presumably spawning considerable litigation in federal court – would enhance students' safety. State law already recognizes a tort action for the failure to protect, *James v. Charlotte-Mecklenburg Bd. of Educ.*, 60 N.C. App. 642, 300 S.E.2d 21 (1983), and state statutes require school officials to adopt and implement detailed school safety plans, N.C. Gen. Stat. § 115C-105.45 *et seq.* In addition to any tort liability, the failure to meet their obligations under those statutes can subject the superintendent, principal and teacher to disciplinary action including the withholding of salary and dismissal. *See* N.C. Gen. Stat. §§ 115C-105.47(b)(2) and (3), and -325(e)(1)a, d, i and j. There is no reason to believe that adding federal litigation to the consequences school officials already face would make them more responsible.

A. *DeShaney* establishes that Alex did not have a liberty interest subject to protection, because his attendance at school did not create a special relationship that would trigger due process rights.

As the district court found, the Stevensons did not allege deprivation of a liberty interest, only a property interest. (Appendix to Petitioners' Petition, at 24). Their first cause of action is entitled "Fourteenth Amendment to the US Constitution Deprivation of Property without due process of law." (J.A., at 16). The only numbered paragraph for that cause of action says the defendants "arbitrarily and capriciously deprived Alex Stevenson of his property interest to public education without due process of law in violation of the Fourteenth Amendment of the US Constitution." (Complaint, ¶ 82, J.A. at 17). Nevertheless, the Fourth Circuit considered the liberty interest argument, and it is the centerpiece of the Stevensons' petition to this Court.

The Stevensons are correct that this Court has not addressed the issue of school officials' responsibility under the Due Process Clause for protection of students from harm by other students. *DeShaney* offers sufficient guidance for school cases, however, and nothing in the Fourth Circuit opinion in this case conflicts with *DeShaney*.

The *DeShaney* court began by observing that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. at 195. A due process right can arise, however, "when the

State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself. . . . " *Id.*, at 200.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id., at 200. The Court recognized that a governmental agency may acquire a duty under state tort law, but "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.*, at 202.

Courts of appeal have had no difficulty applying *DeShaney* to the public school setting – as discussed in Part II below – consistently holding that school attendance does not establish a special relationship. Because the *DeShaney* line of cases is so clear, the Stevensons rely on *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999), for their argument that the Fourth Circuit holding is in conflict with this Court's decisions. Although the Stevensons mix legal theories at times, the crux of their argument is that *Davis* establishes a basis for school officials' liability when they had notice of student-on-student violence and failed to stop it. *Davis*, though, is not about due process, it is about a statutorily created right of action.

The *Davis* lawsuit was brought under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* That federal statute specifically prohibits discrimination on the basis of gender in education programs that receive federal funds. 20 U.S.C. § 1681(a). In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the Court recognized a private right of action under Title IX. Then, in 1992, the Court held in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), that money damages were available in such suits, and in 1998 decided in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), that damages could be awarded for teacher-student sexual harassment.

The question in *Davis* was whether the private right of action for damages under Title IX extended to student-on-student sexual harassment. The Court's decision, based on the history and purpose of Title IX, does not expand the meaning of due process. Consequently, nothing in the Fourth Circuit's decision in the present case is in conflict with *Davis*.[2]

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[2] The Stevensons seem to have abandoned their argument, relied upon so greatly at the trial and circuit level, that the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. § 7101 *et seq.*, creates a private right of action comparable to the Title IX statutory right enforced in *Davis*. The Fourth Circuit properly found that the Safe Schools Act is only a federal grant program; that nothing in the language or purpose of the act suggests such a right; that the Department of Education has promulgated no regulations pursuant to the act; and that no court has held that the act creates a private right of action. Even if the Safe Schools Act were held to create a private right of action, no board liability for damages would exist because the

B. Deprivation of a property interest cannot be based on the student's own withdrawal from school.

The Stevensons' Complaint does allege the deprivation of a property interest in education. Both the district and circuit courts found that the claim failed because of the Stevensons' voluntary withdrawal from the Martin County schools. Due process is at issue only when school officials dismiss or suspend a student so as to deprive the child of the right to public education. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (suspension of student for more than "trivial" period); *Board of Educ. of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 102 S. Ct. 3469, 73 L. Ed. 2d 1273 (1982) (*per curiam*) (suspension for alcohol use); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (discipline for use of obscene language).

Although the theory was not used at the district court, the Stevensons argued to the Fourth Circuit, and repeat in their petition to this Court, that Alex was constructively expelled from school. The Fourth Circuit observed that this "is a novel theory that has not yet been accepted by any court" and that the Stevensons had not

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board would not have received adequate notice of its potential liability. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). The individual defendants would have qualified immunity because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

alleged sufficient facts to support it. (Appendix to Petitioners' Petition, at 8). Moreover, the Stevensons' analogy to constructive discharge in employment cases is inappropriate. In those cases, the constructive discharge is not the offense itself, it is only one element of a claim of discrimination; the actionable conduct must be directed toward a specific individual and not be a claim of generally poor working conditions, *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985); and there must be proof that the employer intended to force the employee to quit, *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984).

II. THE FOURTH CIRCUIT DECISION IS CONSISTENT WITH THE HOLDINGS IN OTHER CIRCUITS.

The circuit courts of appeal are consistent in applying *DeShaney* in school cases. Uniformly, they have held that compulsory school attendance does not establish a special relationship within the meaning of *DeShaney* to trigger due process rights. "Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise." *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990). School attendance does not meet that test because "the government, acting through local school administrations, has not rendered its school children so helpless that an affirmative duty to protect arises" under the Due Process Clause. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364,

1371 (3d Cir. 1992) (*en banc*), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1045, 122 L. Ed. 2d 354 (1993).

The same decision was reached, often in the most excruciating circumstances, in *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707 (3d Cir. 1993); in *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907 (6th Cir. 1995); in *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993); and in *Graham v. Independent Sch. Dist. No. T-89*, 22 F.3d 991 (10th Cir. 1994). School officials' actual or constructive knowledge of previous threats or assaults by the third party have not changed the outcome of the cases. *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 507 U.S. 914, 113 S. Ct. 1266, 122 L. Ed. 2d 662 (1993); *Graham, supra; Middle Bucks, supra.*

The Stevensons also argue that school officials created the danger to Alex and, under *DeShaney*, may be held liable on that basis. However, it was other students, not school personnel, who created the danger. For the Stevensons to succeed on a danger-created theory, "the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995). Consequently, the circuit courts have rejected school liability under danger-created claims just as consistently as with the special relationship theory. *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997); *Middle Bucks, supra; Sargi, supra; Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

It is not out of indifference to students' safety or lack of sympathy for their suffering that the courts reject the due process lawsuits. It is, rather, because schools do not have the custodial relationship to establish a constitutional duty to protect. It is because the students' and parents' remedies lie, instead, in state tort law. "Whatever duty does arise is best left to laws outside the Constitution. . . . " *Alton Community*, 909 F.2d at 272. "A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.' " *DeShaney*, 489 U.S. at 202 (quoting *Daniels v. Williams*, 474 U.S. 327, 335, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).

There is one recent case from the Tenth Circuit finding school officials liable under a danger-created theory. The decision does not seem consistent with other Tenth Circuit decisions and is based on facts that clearly distinguish it from the Stevensons' case.

In *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999), the Tenth Circuit first rejected a claim against the principal, Moore, because "Moore himself did not personally, affirmatively place James [the student] in any danger," but then decided there was a viable claim for failing to train adequately school employees or implement a policy to prevent the assault. The *Sutton* decision seems to contradict earlier Tenth Circuit decisions on state-created danger, such as *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). Also, the court does not explain how the inadequate training enhanced the

danger to the student. The answer seems to lie in the condition of the student.

James Sutton was 14 years old, but "he had severe cerebral palsy . . . he was mentally the age of a three to five-year-old child, and . . . he was totally blind and could not speak." *Sutton*, 173 F.3d at 1240. It would seem to be this helpless condition, including James' inability to communicate except by sign language to his mother, that gave rise to the principal's obligation to develop a policy and train others. The same circumstances did not exist for Alex Stevenson. He communicated frequently with school personnel, spoke with his father daily, had no different mental ability than other students his own age, and was not in a helpless condition. Admittedly, the outcome of *Sutton* differs from the outcome of the present case – just as it conflicts with other Tenth Circuit cases such as *Maldonado v. Josey, supra*, and *Graham v. Independent Sch. Dist. No. T-89, supra* – but the conflict is the result of an extreme difference in facts rather than a different view of the law.

In their petition the Stevensons claim conflicts with decisions of the Third, Fifth and Tenth circuits. Except for *Sutton*, the cases they cite are not school cases and the conflict they perceive has to do with different articulations of the state liability analysis in other contexts. The Stevensons' discussion ignores the school cases directly on point in those three circuits, such as *D.R. v. Middle Bucks Area Vocational Technical Sch., supra*, and *Black v. Indiana Area Sch. Dist., supra* (Third Circuit), *Doe v. Hillsboro Indep. Sch. Dist., supra* (Fifth Circuit), and *Maldonado v. Josey, supra*, and *Graham v. Independent Sch. Dist. No. T-89, supra* (Tenth Circuit). The Stevensons do cite

another case from the Third Circuit, *Fenstermaker v. Nesfedder*, 802 F. Supp. 1258 (E.D. Pa. 1992), *aff'd in part and vacated in part*, 9 F.3d 1540 (3d Cir. 1993), for the proposition, they say: "school liable when coach, who did not participate, stood by and allowed students to engage in hazing ritual." *Fenstermaker*, however, is about a wrestling coach's decision to have an injured student continue competing after being injured, and the district court found no liability. The Third Circuit decision is unpublished and unavailable to respondents.

III. THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT DECISION AND DECISIONS OF THE NORTH CAROLINA SUPREME COURT.

The Stevensons' argument about conflict with North Carolina Supreme Court decisions on the public duty doctrine is beside the point.

The public duty doctrine generally holds that public officials who act upon a duty to protect the public generally are not liable for the failure to protect specific individuals. In a series of cases over the last several years, the North Carolina Supreme Court has wrestled with the applicability of the doctrine to anyone other than law enforcement officers, but that debate is irrelevant to the Stevensons' case.

The public duty doctrine might have a place in an argument about school officials' liability under state law, if that were an issue. State law, however, long has recognized an action for negligence when school personnel fail to protect students from harm by other students, applying general common law principles. *James v. Charlotte-*

Mecklenburg Bd. of Educ., 60 N.C. App. at 648, 300 S.E.2d at 24 ("foreseeability of harm to pupils in the class or at the school is the test of the extent of a teacher's duty to safeguard her pupils from dangerous acts of fellow pupils").

The Fourth Circuit decision in the instant case is not in conflict with North Carolina law on school officials' tort liability, nor with the cases on the public duty doctrine. Even if there were such a conflict, it would only pertain to matters of state law, with no effect on the federal due process analysis.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in this case is not in conflict with any decision of this Court, decisions from other circuits, or decisions of the North Carolina Supreme Court. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this 8th day of August 2001.

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